Limba Jaya Timber Sdn Bhd & Anor v Superintendent of Lands and Surveys, Limbang & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01(IM)346–09 OF 2016
DAVID WONG, HAMID SULTAN AND UMI KALTHUM JJCA
27 JULY 2017

Civil Procedure — Parties — Striking out of — Appellants filed appeal against decision of first respondent — First respondent applied for his name to be struck out as party to action — Whether proper for decision maker to be made respondent to an appeal to High Court against his decision — Rules of Court 2012 O 55A

The appellants had filed an appeal in the High Court against the decision of the first respondent in granting right of way to the second respondent pursuant to s 34 of the Sarawak Land Code. In response, the first respondent applied in encl 7 to strike out the appellant's appeal as well as for his name to be struck out as party to the action under O 33 r 1, O 15 r 6(2)(a), O 18 r 19(1)(a), (b), (c) or (d) and O 92 r 4 of the Rules of Court 2012 ('the ROC'). The learned judicial commissioner allowed the first respondent's application, hence the present appeal. The issue of law for court's determination was whether it was proper for the decision maker (the first respondent) to be made a respondent to an appeal to the High Court against his decision pursuant to O 55A of the ROC.

Held, allowing the appeal with costs of RM5,000 for here and below subject to payment of allocator; and setting aside the order of the High Court:

(1) The court agreed that when paras 1(1) and 1(4) of O 55A of the ROC were read together, it was clear that O 55A provided for the decision maker (other than the interested party) be made the respondent to the appeal. Paragraph 1(1) made a reference to 'an appeal lies from any decision of any person or body or persons' to the High Court whilst para 1(4) provided for 'the originating summons shall be served on the respondent on such appeal or where the respondent is a body of persons, on the secretary, registrar or such other officer of that body of persons'. It stands to reason that the decision maker be served with the originating summons in this context since the appellants' appeal was in regard to his decision and in the process the courts had the duty to supervise the decision maker's decision to ensure that he did not commit errors of law in coming to his decision. Further, based on decided cases, citing the decision maker as a party to the action was not an isolated practice; in fact, the opposite was true (see paras 16 & 18).

A **[Bahasa Malaysia summary**

Perayu-perayu telah memfailkan rayuan di Mahkamah Tinggi terhadap keputusan responden pertama dalam memberi hak lalu-lalang kepada responden kedua berikutan s 34 Kanun Tanah Sarawak. Dalam menjawab, responden pertama memohon dalam lampiran 7 untuk membatalkan rayuan perayu dan juga untuk namanya dibatalkan sebagai pihak kepada tindakan di bawah A 33 k 1, A 15 k 6(2)(a), A 18 k 19(1)(a), (b), (c) atau (d) dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Pesuruhjaya kehakiman membenarkan permohonan responden pertama, maka rayuan ini. Isu undang-undang untuk penentuan mahkamah adalah sama ada ia adalah betul untuk pembuat keputusan (responden pertama) dijadikan responden di dalam rayuan kepada Mahkamah Tinggi terhadap keputusannya berikutan A 55A KKM.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM5,000 untuk mahkamah ini dan bawahan tertakluk kepada bayaran alokatur; dan mengenepikan perintah mahkamah:

(1) Mahkamah bersetuju bahawa apabila perenggan 1(1) dan 1(4) A 55A KKM dibaca bersama, ia adalah jelas bahawa A 55A memperuntukkan pembuat keputusan (selain daripada pihak berkepentingan) dijadikan responden kepada rayuan tersebut. Perenggan 1(1) membuat rujukan kepada 'an appeal lies from any decision of any person or body or persons' Mahkamah Tinggi sementara perenggan 1(4) memperuntukkan 'the originating summons shall be served on the respondent on such appeal or where the respondent is a body of persons, on the secretary, registrar or such other officer of that body of persons'. Ia adalah jelas bahawa pembuat keputusan diserahkan dengan saman pemula dalam konteks ini memandangkan rayuan perayu-perayu adalah berkaitan keputusannya dan dalam proses mahkamah mempunyai tugas untuk mengawas keputusan pembuat keputusan untuk memastikan yang beliau tidak melakukan apa-apa kesilapan undang-undang dalam mencapai kepada keputusannya. Selanjutnya, berdasarkan atas kes-kes yang diputuskan, merujuk pembuat keputusan sebagai pihak kepada tindakan bukan amalan yang terpencil; pada hakikat, sebaliknya adalah benar (lihat perenggan 16 & 18).]

Notes

For cases on striking out of parties, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7142–7149.

Cases referred to

Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals [2007] 4 MLJ 489; [2007] 3 CLJ 97, CA (refd)

Alami Vegetable Oil Products Sdn Bhd v Lombard Commodities Ltd [2009] 3

MLJ 289; [2009] 4 CLJ 700, CA (refd)
Ambiga a/p Sreenevasan v Ketua Pengarah Imigresen, Malaysia & Ors [2012] 1 MLJ 92; [2012] 7 CLJ 170, HC (refd)
Bar Malaysia v Index Continent Sdn Bhd [2016] 1 MLJ 445; [2016] 2 CLJ 545, FC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)
Kelab Renang Pulau Pinang v Pentadbir Tanah, Daerah Timur Laut, Pulau Pinang & Anor [2014] 6 MLJ 134; [2014] 5 CLJ 341, CA (refd)
Motif Unik Sdn Bhd v Khoo Ah Soon & Anor [2012] 10 CLJ 612, HC (refd)
Ng Men Soon dan satu lagi lwn Pentadbir Tanah Daerah Muar dan satu lagi [2010] 8 MLJ 388, HC (refd)
Tan Guan Seng v Sibuti Yon Seng Quarry Sdn Bhd & Ors [1973] 2 MLJ 116, FC (distd)
Thankam De Silva lwn Pentadbir Tanah, Daerah Larut dan Matang Taiping [1995] MLJU 389; [1995] 4 CLJ 584, HC (refd)

Legislation referred to

Federal Constitution art 121(1B)
Malaysia Act 1963
National Land Code s 418
Rules of Court 2012 O 15 r 6(2)(a), O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d), O 33 r 1, O 55A, O 55A r 1(1), (4), O 92 r 4
Rules of the High Court 1980 O 55 r 13
Rules of the Supreme Court 1957 O 16 r 11, O 59 r 13(1), (3)
Sarawak Land Code (Cap 81) s 34, 34(6)

Appeal from: Originating Summons No LMN-24–2/1 of 2016 (High Court, Limbang)

Leong Hsin Ru (Tang & Partners) for the appellants.
Joseph Chioh Hock Hua (Ronald Felix Hardin with him) (State Legal Officer, State Attorney-General's Chambers) for the first respondent.

Umi Kalthum JCA:

BRIEF FACTS

[1] This appeal is in relation to the first respondent's decision dated 4 January 2016 to grant the right of way to the second respondent pursuant to s 34 of the Sarawak Land Code ('the SLC'). Dissatisfied with the first respondent's decision, the appellants filed an appeal to the High Court by way of an originating summons pursuant to s 34(6) of the SLC, citing the first respondent and the second respondent as parties to the appeal.

[2] The first respondent then applied in encl 7 to strike out the appellants' appeal to the High Court as well as for his name to be struck out as party to the originating summons under O 33 r 1, O 15 r 6(2)(a), O 18 r 19(1)(a), (b), (c) or (d) and O 92 r 4 of the Rules of Court 2012 ('the RC').

DECISION OF THE HIGH COURT

[3] The learned judicial commissioner ('JC') allowed the first respondent's application with costs of RM2,000. In deciding so, the learned JC felt he was bound by the Federal Court case of *Tan Guan Seng v Sibuti Yon Seng Quarry Sdn Bhd & Ors* [1973] 2 MLJ 116 which ruled that the Superintendent of Lands and Surveys, who was the adjudicator in the right of way inquiry, should not be made as the respondent and it sufficed that the party who is claiming the right of way to be made a party instead.

THE APPEAL

[4] In the appeal before us, the appellants had withdrawn their appeal against the second respondent.

[5] The appellants' appeal against the first respondent is centered on only the issue of law which is, is it proper for the decision maker/the first respondent to be made a respondent to an O 55A of the RC appeal to the High Court against his decision. The notice of appeal was filed on 5 August 2016, which means the RC apply to the appellants' appeal. Order 55A is a new Order which replaces the previous O 55 r 13 of the Rules of the High Court 1980 ('the RHC'). In replacing O 55 r 13 of the RHC, O 55A had made more detailed provisions on appeals from statutory bodies and tribunals. Order 55A sets out the procedure for appeal from any decision made by any person or body of persons to the High Court as follows:

ORDER 55A

APPEALS TO HIGH COURT UNDER WRITTEN LAW

1 *Appeals to the High Court under written law (O 55A, r 1)*

(1) Where under any written law an appeal lies from any decision of any person or body of persons to the High Court such appeal shall be made to the High Court in the State where the decision was given by way of an originating summons setting out the grounds of the appeal and supported by an affidavit, and if the Court so directs at the hearing of the appeal, by way of oral evidence.

(2) The appellant shall annex the following documents as exhibits to the affidavit filed in support of the originating summons or to such further affidavit as may be filed in the appeal proceedings:

(a) the notes of evidence, if available; recorded wholly or partly by mechanical means;

(b) the grounds of decision, if available; A

(c) the decision of the statutory body, if available; and

(d) all such documentary exhibits and other documents the parties shall consider relevant for the purposes of appeal:

Provided that the originating summons shall be filed notwithstanding that the grounds of decision are not available or ready. If the grounds of decision become available, then they shall be filed by way of a further affidavit without the leave of the High Court. B

(3) Unless otherwise provided by any written law, such appeal must be filed in the manner prescribed in paragraph (2) within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing, whichever is the later date. C

(4) Unless otherwise provided by any written law, the originating summons shall be served on the respondent in such appeal or where the respondent is a body of persons, on the secretary, registrar or such other officer of that body of persons. D

[6] Order 55A of the RC has to be read together with s 34(6) of the SLC, which is as follows:

(6) Any person aggrieved by any decision of the Superintendent under this section may, within thirty days of being informed of such decision, appeal to the High Court and for the purpose of further appeal any decision of the High Court shall be deemed to be made in a civil proceeding. E

[7] The learned JC in coming to his decision held that O 55A of the RC does not prescribe that the decision maker whose decision being appealed against shall be a respondent in the appeal. Learned counsel for the appellants argues that this interpretation of O 55A is erroneous because, amongst others: F

(a) when O 55A r 1(1) and 1(4) are read together, it does prescribe that the decision maker of the decision being appealed against, shall be a respondent in a statutory appeal; G

(b) in the other form of judicial redress/control in respect of administrative action, that is, judicial review proceedings, the decision maker is always made a respondent to the same — see *Ambiga a/p Sreenevasan v Ketua Pengarah Imigresen, Malaysia & Ors* [2012] 1 MLJ 92; [2012] 7 CLJ 170; and H

(c) the learned JC failed to apply the Federal Court decision of *Bar Malaysia v Index Continent Sdn Bhd* [2016] 1 MLJ 445; [2016] 2 CLJ 545 which held that statutes must be construed with a purposive approach. I

[8] Further, it is argued that learned JC was wrong when he:

A (a) found that the appellants had failed to produce any authorities which interpret O 55A of the RC as prescribing that the decision maker shall be a respondent in such an appeal. The appellants had cited ten cases where the land administrator was the respondent in the appeal to the High Court arising out of his decision, such as, *Ng Men Soon dan satu lagi lwn Pentadbir Tanah Daerah Muar dan satu lagi* [2010] 8 MLJ 388 and *Motif Unik Sdn Bhd v Khoo Ah Soon & Anor* [2012] 10 CLJ 612;

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(b) found that the ten authorities cited were irrelevant because they were made pursuant to s 418(1) of the National Land Code whereas the appellants' case concerned s 34(6) SLC, as the learned JC failed to appreciate/distinguish the difference between:

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(i) a provision which confers a right of appeal as in s 418(1) of the National Land Code and s 34(6) of the SLC; and

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(ii) a procedural provision which prescribes the procedure for the appeal.

[9] It is also the contention of the appellants that the learned JC had erred in law and in fact and had seriously misdirected himself in holding that *Tan Guan Seng* is still good law and/or binding on him as he:

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(a) failed to consider O 59 r 13(1) and 13(3) of the Rules of the Supreme Court 1957 (the predecessor to the present O 55A r 1(1) and 1(4) of the RC) was not highlighted to the Federal Court in *Tan Guan Seng*;

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(b) should have followed that Court of Appeal's decision in *Abu Bakar bin Ismail & Anor v Ismail bin Husin & Ors and other appeals* [2007] 4 MLJ 489; [2007] 3 CLJ 97 and *Alami Vegetable Oil Products Sdn Bhd v Lombard Commodities Ltd* [2009] 3 MLJ 289; [2009] 4 CLJ 700 which held that a decision given in ignorance of the existence of a statutory provision is a per incuriam decision and cannot safely be relied on;

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(c) failed to consider the Federal Court's opinion in *Tan Guan Seng* with regard to whether the Superintendent of Lands and Surveys should have been made a respondent to the appeal, was incidental and not directly upon the issue before the Federal Court. The actual issue before the court was the limitation period in respect of an order for substitution of a party;

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(d) should have followed the authority of *Alami Vegetable Oil Products Sdn Bhd* which held that only the ratio decidendi of a prior case binds courts of lower jurisdiction;

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(e) failed to consider that there are no other case authorities in Malaysia since the 1973 decision of *Tan Guan Seng* which have followed and/or referred to the same. On the other hand, there are numerous case authorities since then and up to recent times where the decision maker

was a respondent in the statutory appeal without issue; and

(f) should have followed the Federal Court's decision in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 which held that the courts are permitted to depart from a previous decision which is wrong, unjust, outmoded and/or absolute in the modern conditions.

[10] As for the opinion expressed by the learned JC that the first respondent should not be made a party to the appeal because he has no interest in it, his role is merely to exercise his adjudicative function pursuant to the law, and whether the appellants win or lose the appeal does not really matter to the first respondent, it is contended by the appellants that such opinion goes against the established principle that where permitted by statute, the courts have the jurisdiction to ensure that a decision-making authority does not commit errors of law in coming to its decision.

[11] The learned senior state counsel, acting for the first respondent, essentially supports the positions taken by the learned JC.

OUR DECISION

[12] After perusing the submissions of parties and the authorities cited, we unanimously hold that the appeal is allowed with costs of RM5,000 for here and below and subject to the payment of allocatur. The order of the High Court is set aside and the deposit is refunded to the appellants. Our decision is based on the following grounds.

[13] This court was established by the Constitution (Amendment) Act 1994 (Act A885) whereby s 13 thereof had added cl (1B) to art 121 of the Federal Constitution establishing the Court of Appeal on 24 June 1994. Before the establishment of this court, the Federal Court was established on 16 September 1963 under the Malaysia Act 1963 (No 26 of 1963). In the hierarchy of the superior courts then, below the Federal Court were the High Court in Malaya and the High Court in Sabah and Sarawak and above the Federal Court then was the Judicial Committee of the Privy Council. *Tan Guan Seng*'s case was decided by the Federal Court then in 1973. Being the highest court of appeal then (save for the Privy Council), the said Federal Court decision therefore is binding on this court in view of the superior courts hierarchy.

[14] Be that as it may, we wish to distinguish *Tan Guan Seng*'s case from the appeal before us. We find that the statement made by Ismail Khan CJ (as he then was), in delivering the judgment of the Federal Court at p 116, paras H–I, right:

A At the inquiry before the superintendent, the parties to the dispute were the respondents who claimed the right of way, and the appellant who opposed such claim. In the appeal by the appellant against his decision, the party claiming the right of way should have been made respondent and not the superintendent, the adjudicator. It is difficult to understand why he was made the respondent. He B therefore took the right step in obtaining the order for the substitution of the respondents in his place. See O 16 r 12 which says:

> 12 Any application to add or strike out or substitute a plaintiff or defendant may be made to the court or a judge at any time before trial by motion or summons, or at the trial of the action in a summary manner.

C The respondents were added as a new party in place of the party removed ...

as being obiter dictum, incidental to the ratio of the case and thus not binding on us. The ratio of the case relate to the question of whether the order for substitution of parties was made after the prescribed limitation period and the D Federal Court held that the appeal against the substituted respondents could only be deemed to be lodged on the day when they were substituted. Since this was after the expiry of the period of limitation, the appeal was out of time. In *Alami Vegetable Oil Products Sdn Bhd*, Malik Ishak JCA (as he then was) said at p 713, para 29, as follows:

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> [29] But more apt to the occasion and to the present appeal at hand would be the speech of May LJ in the case of *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577 at p 582; [1988] 3 WLR 867 at p 873, where he said:
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> > In my opinion the doctrine of precedent only involves this: that when a case has F been decided in a court it is only the legal principle or principles on which that court has so decided that bind courts of concurrent or lower jurisdictions and require them to follow and adopt them when they are relevant to the decision in later cases before those courts. The ratio decidendi of a prior case, the reason why it was decided as it was, is in my view only to be understood in this somewhat limited sense.

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[15] Moreover, at the time when *Tan Guan Seng* was decided, the civil procedure rules in force were the Rules of the Supreme Court 1957 (LN 321/1951) ('the RSC'), in particular O 59 r 13(1) and 13(3) which stated H as follows:

> 13(1) Where under any written law an appeal lies from any decision of any person or body of persons to the High Court or to the Supreme Court such appeal shall be made to the High Court in the State where the decision was given by motion setting out the grounds of appeal, supported by affidavit and, if the Court so directs at the I hearing, by oral evidence.
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> ...
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> (3) Unless otherwise provided by any written law, notice of the motion shall be served on the respondent in such appeal or where the respondent is a body of persons, on the secretary, registrar or such other officer of that body of persons.

The provisions of O 59 paras 13(1) and 13(3) were not referred to the Federal Court. Only O 16 r 11 was addressed by the Federal Court. We are of the view that if the Federal Court had been referred to O 59 paras 13(1) and 13(2) of the RSC, it might have come to a different conclusion, as we do vis the similar provisions of O 55A paras 1(1) and 1(4) of the RC.

[16] With regard to the current O 55A of the RC provisions, we are in agreement with the submission of learned counsel for the appellants, in that, when paras 1(1) and 1(4) of O 55A are read together, it is clear that O 55A provides for the decision maker (other than the interested party) be made the respondent to the appeal. Paragraph 1(1) makes a reference to 'an appeal lies from any decision of any person or body or persons' to the High Court whilst para 1(4) provides for 'the originating summons shall be served on the respondent on such appeal or where the respondent is a body of persons, on the secretary, registrar or such other officer of that body of persons'. It stands to reason that the decision maker be served with the originating summons in this context since the appellants' appeal is in regard to his decision and in the process the courts have the duty to supervise the decision maker's decision to ensure that he does not commit errors of law in coming to his decision. There are numerous cases reiterating this principle of law, but suffice for us to refer to the book entitled *Civil and Criminal Appeals in Malaysia* (3rd Ed), Sweet and Maxwell Thomson Reuters, by Tan Kee Heng where the learned author, at pp 87–88, stated as follows (in the context of judicial review, which equally applies to appeals from persons or body of persons):

> *3.1.1 The right of appeal*
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> [3.001] A right of appeal against any decision of any person or body of persons is only available if there is any written law providing for that right. In Malaysia, there are numerous statutory provisions which provide that certain administrative decisions 'shall be final and conclusive', 'shall not be questioned in any legal proceedings whatsoever', 'shall not be subject to appeal or review in any court' or 'shall not be challenged, appealed against, reviewed, quashed or called in question in any court on any ground'. Generally speaking, the effect of all such words is to oust both the appellate and supervisory jurisdiction of the courts to review, reverse or set aside such decisions. However, it must be noted that an inferior tribunal or other decision-making authority, whether, exercising a quasi-judicial function or a purely administrative function, has no jurisdiction to commit an error of law, whether the error is jurisdictional or not and accordingly, its decision will not be immunised from judicial review by an ouster clause however widely drafted.

[17] We are fortified in our views when we refer to the many cases cited by the appellants which no doubt relate to s 418 of the National Land Code but which section similarly enables a person to appeal to the High Court from a decision of the State Director, the Registrar or any land administrator. The land administrator has been cited as a respondent in, for example, *Ng Meng Soon*; *Motif Unik Sdn Bhd*; *Thankam De Silva lwn Pentadbir Tanah, Daerah Larut*

A *dan Matang Taiping* [1995] MLJU 389; [1995] 4 CLJ 584; and *Kelab Renang Pulau Pinang v Pentadbir Tanah, Daerah Timur Laut, Pulau Pinang & Anor* [2014] 6 MLJ 134; [2014] 5 CLJ 341.

B **[18]** Similarly, there are umpteenth cases in respect of judicial review applications where the decision maker is commonly cited as a party to the action — see for example *Ambiga a/p Sreenevasan*. So citing the decision maker as a party to the action is not an isolated practice; in fact the opposite is true.

C *Appeal allowed with costs of RM5,000 for here and below subject to payment of allocator; order of High Court set aside.*

Reported by Dzulqarnain Ab Fatar

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